

NO. 46348-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MANUEL URRIETA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Vicki L. Hogan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated appellant's right to present a complete defense when it excluded testimony rebutting the prosecutor's accusation that a defense witness was lying.

2. Prosecutorial misconduct in cross-examination and closing argument violated appellant's right to a fair trial.

3. Admission of evidence that appellant asserted his constitutional right to refuse consent to testing of his breath for alcohol content violated his constitutional privacy rights under the Fourth Amendment and Article I, Section 7.¹

4. Counsel was ineffective in failing to object to inadmissible evidence that appellant asserted his constitutional right to refuse breath testing for alcohol.

5. Cumulative error deprived appellant of a fair trial.

6. The trial court violated appellant's constitutional right to a public trial by conducting peremptory challenges on paper.²

¹ This issue is currently pending before the Supreme Court in State v. Baird, no. 90419-7 (direct review granted August 5, 2014).

² This Court has declined to apply the public trial right to peremptory challenges, and petitions for review are pending in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013) (Supreme Ct. No. 89619-4), State v. Dunn, 180 Wn. App. 570, 321 P. 3d 1283 (2014) (Supreme Ct. No. 90238-1), and State v. Webb, ___ Wn. App. ___, 333 P.3d 470 (2014) (Supreme Ct. No. 90840-1). The Court again rejected this argument this month in State v. Filitaula, ___ Wn. App. ___, ___ P.3d ___ (no. 72434-7-I, filed Dec. 8, 2014) and State v. Marks, ___ Wn. App. ___, ___ P.3d ___ (No. 44919-6-II, filed Dec. 2, 2014).

Issues Pertaining to Assignments of Error

1. Appellant was charged with unlawfully possessing a firearm found in the car he was driving. During cross-examination, the prosecutor insinuated a defense witness invented the names of the two back seat passengers. Appellant sought to admit evidence to corroborate one passenger's name. Did the exclusion of this evidence violate appellant's constitutional right to present a complete defense?

2. A prosecutor may not suggest the defense should be penalized for putting on witnesses, offer personal opinions on witness credibility or guilt, align himself with the jury against the defendant, or inflame the emotions of the jury.

a. Did the prosecutor commit misconduct by encouraging the jury to punish appellant for the late disclosure of a defense witness?

b. Did the prosecutor commit misconduct by arguing a defense witness made "mistakes" while testifying, arguing he "went after [appellant] because I wanted the truth," and suggesting a defense witness was lying about a fact the prosecutor likely knew was true?

c. Did the prosecutor commit misconduct by blaming the defense for a 20-minute delay and arguing to the jury, "They can't do this to you" and "They underestimate you"?

3. Under State v. Gauthier,³ refusing consent to a warrantless search may not be used as evidence of guilt. The trial court admitted evidence appellant refused a breath test when he was stopped for driving under the influence. Did the use of this evidence violate appellant's constitutional right to refuse consent to a warrantless search?

4. Did cumulative error deprive appellant of a fair trial?

5. Peremptory challenges were exercised silently on paper. Because the trial court did not analyze the Bone-Club⁴ factors before conducting this important part of jury selection in private, did the trial court violate appellant's constitutional right to a public trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant Manuel Urrieta with one count of unlawful possession of a firearm in the first degree, one count of driving under the influence, and one count of driving with a suspended license in the third degree. CP 10-11. Urrieta pled guilty to the two misdemeanors, and the jury found him guilty of unlawful possession of a firearm. CP 17-18. The court imposed a standard range felony sentence to

³ State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013).

⁴ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

run concurrently with the misdemeanor sentences. CP 56, 63. Notice of appeal was timely filed. CP 70.

2. Substantive Facts

On the way home from a party, Urrieta was pulled over while driving his father's car. 1RP⁵ 25-26, 113. In the car with him were his cousin Francisco Santiago and two of Santiago's friends. 1RP 96-97. He admitted he had been drinking that night and had no valid driver's license. 1RP 110-11. Police told the three passengers to leave on foot or call someone to be picked up. 1RP 49. They were not detained or questioned. 1RP 31.

During the inventory search before the mandatory twelve-hour impound of the car, Officer Hurley found a semiautomatic pistol and a magazine of ammunition under the driver's seat. 1RP 50. A butterfly knife was also found on the rear floorboard behind the passenger seat. 1RP 53. Urrieta testified he did not know the firearm was there. 1RP 112. No fingerprints were found on the firearm. 1RP 83-84.

Santiago testified the two passengers in the back seat were his friends Jake Boyd and Aaron Letho and Urrieta did not know them well. 1RP 96-97. Santiago testified that, as the car was being pulled over, he looked behind him to see the police car. 1RP 98. At that moment, he also saw Boyd, seated behind Urrieta, pull a gun from his pocket and put it beneath

⁵ There are two volumes of Verbatim Report of Proceedings referenced as follows: 1RP – May 15, 19, 20, 30, 2014; 2RP – May 15, 19, 2014.

the driver's seat. 1RP 98. Santiago did not stay at the scene or tell police what he had seen because he was under 21 at the time and had been drinking. 1RP 99. He was frightened, and, when the police told him to leave, he left. 1RP 99-100.

Santiago testified the first time he spoke to defense counsel about what he had seen was that same day during the lunch break. 1RP 101. He had spoken to Urrieta over the weekend and had finally told him what he had seen. 1RP 121. The prosecutor was not able to interview Santiago until after the lunch break and the close of the State's case. 1RP 93.

In opening statements, the prosecutor told the jury, "[T]he state will present credible evidence that on January 18th, 2014, the defendant Mr. Urrieta, unlawfully possessed a firearm after having been convicted of a serious offense." 2RP 80. Defense counsel described the evidence as consistent with a back seat passenger taking a gun, wiping prints off of it, and kicking it under the driver's seat. 2RP 86. He explained the evidence would show that at least one of the three passengers was "shedding weapons" in the back seat before leaving the vehicle, which Urrieta would have had no opportunity to do. 2RP 86. He argued the State would not be able to prove Urrieta knew the gun was under the seat. 2RP 86-87.

a. Cross-Examination of Defense Witnesses

The prosecutor's cross-examination of Santiago focused on the timing of Santiago's testimony in relation to the State's presentation of its case:

Q: Were you aware that he was in jail for two months?

A: Yes.

Q: And you never said anything. Is that what you want us to believe, that you knew this the whole time and you wait until after I rested and my officers leave and then you come here?

A: Yeah.

Q: My officers leave and now you have it. You said that you were scared. That's what you said. You gave the jury two explanations, right? First you said that you were scared, right?

A: I was scared.

Q: You were scared. But you just told the jurors that Jake, Jake Boyd, and what's the other guy's name?

A: Aaron.

Q: We have never talked about this, right?

A: Right.

Q: We never – I'm learning this right now. So you, Jake Boyd and Aaron, you said this, they are your friends. You told the jurors that, right? So what are you scared of? These are your friends. Tell them what you are scared of. Look at the jurors and answer the question. What are you scared of?

A: I just didn't want to be involved in nothing.

Q: And so now we go to point two. I have got my own problems. What problems? What problems – if you are telling the truth, then your problems are more important than your cousin sitting in jail for months, the one you love. You love him and you are going to let him sit in jail for a month?

A: That was my fault, I know. I understand it. He was sitting in jail because I didn't say anything.

Q: So that's it, right?

A: I have nothing else to say, yeah.

Q: So you have more to say because I have more questions for you. It doesn't end right there. What are your problems?

A: I got my own, a newborn, and job wise and my courts and I have to deal with other things in my life.

Q: That's life. What problems do you have? The truth is, the truth is you spoke to him, you spoke to him last week, didn't you?

1RP 102-04. At the close of the cross-examination, the prosecutor asked Santiago, "And you expect to come in here after all that's been said and done and just tell the jurors whatever you want?" 1RP 105. At this point, the court sustained defense counsel's objection that the question was argumentative. 1RP 105.

On re-cross, the prosecutor again focused on the timing of Santiago's discussions with defense counsel about both Boyd and Letho:

Q: That was the first time was less than an hour ago, right that you told him [defense counsel] about Jacob, correct?"

A: Yes.

Q: And you didn't – and what's the other – I keep forgetting the other guy's name.

A: Aaron.

Q: Aaron. And this guy, Aaron, right, let me guess, both of these guys were in the backseat?

A: Yes.

Q: And you were in the front seat?

A: Yes.

Q: Okay. And so the first time that you brought up Aaron was less than an hour ago?

1RP 108.

The prosecutor's cross-examination of Urrieta also began with a focus on the timing of the disclosure of Santiago's testimony: "How long have you known – man, I apologize, I forgot the gentleman's name. I just met him today – Mr. Santiago, how long have you known him?" 1RP 112.

Because of the prosecutor's insinuations that Santiago must have made up both Boyd and Letho, defense counsel sought to re-call Officer Drasher or admit the dispatch report to demonstrate that Letho's name was listed. 1RP 126-27. The court decided Letho's identity was merely collateral and denied the request. 1RP 128. The dispatch report was rejected because it contained hearsay. 1RP 128.

The prosecutor also questioned Urrieta about his refusal to take the alcohol breath test despite having been warned of the consequences. 1RP 114-15. The prosecutor then questioned Urrieta about the conditions of release that prohibited contact with witnesses. 1RP 116. Urrieta first testified he did not know what Santiago would say, but merely called him to ask him to come and testify. 1RP 116-18. He explained he did not realize the order applied to Santiago because he was not listed as a witness on any police report. 1RP 117. The prosecutor asked him, “Why would you want him here and how would you know that he was going to say it wasn’t your gun if you didn’t know that he was going to tell us and make up this name called Jacob?” 1RP 120. The defense’s objection to the argumentative question was sustained. 1RP 120. While Urrieta was attempting to answer the rephrased question, the prosecutor admonished him, “Look at the jurors.” 1RP 121. Urrieta explained he asked Santiago to testify because Santiago had been there and knew the gun was not Urrieta’s. 1RP 121-22. It was only the previous weekend that Urrieta learned what Santiago had seen. 1RP 121-22.

b. Closing Argument

During closing argument, the prosecutor argued Santiago should not be believed, referring to a “mistake that Mr. Santiago made, one of many he made on the stand.” 1RP 138. He then explained the “mistake” to which he

was referring was that Santiago did not mention seeing Boyd place a magazine under the seat along with the gun. 1RP 138.

The prosecutor argued Santiago's testimony about Boyd placing a gun under the seat was "nothing like" defense counsel's opening argument about the passengers shedding weapons before leaving the car. 1RP 146-47. He then explained to the jurors that one of the delays in the trial was the wait for Santiago to arrive:

It's not defense counsel's fault. The defendant is the one who called him and told him to come here. He is the one who was speaking to him. He called him after the State rested. He admitted that on the stand. I called him, and in the hallway he told his attorney, he will be here in 20 minutes. 20 minutes, and that's what we were waiting for.

1RP 147. The next part of the prosecutor's argument described Santiago and Urrieta as "underestimating" the jury:

He came here and he had a story. What was his story? And I know I was hard on him. I know that I was probably overly passionate, but I had to get to it because this was new information. You don't get to do this, and you know what? They truly underestimate you. They underestimate you. They think that they can come in here and change the game, change the analysis, attack that knowing because that's the only issue, right? Knowing. He didn't know.

Everything else is there. We are going to concede everything else, but he didn't know it. They can't prove it. They want to create some doubt so someone can go back there in that jury room and say, well, Santiago said it, but we have to look at his testimony.

1RP 147. The prosecutor then argued Santiago's testimony was not credible because if he truly cared about his cousin, he would have come forward much sooner. 1RP 147-48. But then the prosecutor returned to the theme, "His cousin was in jail for two months and he isn't going to say anything? Really? They underestimate you." 1RP 149. He reminded the jury, "Remember, defense counsel didn't mention this story during opening because he didn't know about it." 1RP 150.

The prosecutor then turned to arguments about Urrieta's credibility: "The defendant didn't know about it, right? If you believe that. Let's talk about the Defendant's testimony. He didn't have to testify, but he chose to. And I went after him because I wanted the truth." 1RP 150. The prosecutor argued Urrieta knowingly violated a court order by calling Santiago and asking him to testify. 1RP 151. He argued if Urrieta was telling the truth about speaking to Santiago on Sunday, then Santiago lied when he said he did not speak to him at all. 1RP 151.

This argument was followed up with more references to underestimating the jury:

They can't do this to you. They underestimate you. They are trying to go after the one prong they think they have room to, and that is knowledge.

Put it on someone else. We will make up a name, Jacob. We will make this guy up. It's too late for the State to do anything. They can't go out and conduct their investigation.

They already rested their case. He will be here in 20 minutes. That's what he was telling his attorney. He will be here in 20 minutes. His attorney – he already gave his opening. He already told you that they were shedding weapons. Now he has to change his theory, right?

1RP 151-52.

Finally, the prosecutor argued:

He watched his attorney give opening statements, talking about shedding weapons. He didn't do anything. He just sat there. Lunch time he didn't say anything to his attorney, and then after the State rests, he says, oh, I have a story now. You cannot believe that is credible. It's not credible.

The defendant knowingly possessed a firearm. When you think about the ridiculous nature of the story –

1RP 153. At this point, defense counsel's objection was sustained and the jury was instructed to disregard. 1RP 153.

c. Peremptory Challenges

Before the jury was brought in for voir dire, the court announced that peremptory challenges would be exercised on paper. 2RP 7. At the end of voir dire, the court announced that the attorneys would be exercising their challenges, told jurors they could talk amongst themselves, and invited the attorneys up to the lower bench. 2RP 69-70. The court told the attorneys, "So when you get done with your challenges, just step back up so I can verify the 12." 2RP 70. A pause in the proceedings ensued, after which the court announced, "[T]he attorneys have exercised their challenges." 2RP 70.

The list showing which side had excused which jurors during peremptory challenges was filed in the court record. CP 78.

C. ARGUMENT

1. URRIETA'S RIGHT TO PRESENT A COMPLETE DEFENSE WAS DENIED WHEN THE COURT EXCLUDED EVIDENCE CORROBORATING PORTIONS OF HIS DEFENSE.

Criminal defendants have the constitutional right to present evidence in their own defense. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. V, VI, XIV. In light of this essential constitutional due process protection, the trial court's exclusion of defense evidence is subjected to a high level of scrutiny. Jones, 168 Wn.2d at 719-20. Courts review de novo whether exclusion of defense evidence violated the right to present a defense. Id.

Officer Drasher's testimony and the dispatch report corroborating that Letho was one of the back seat passengers was directly relevant to whether Urrieta knew the gun was there. Even if the specific name might initially have had minimal relevance, the open door doctrine mandated admission after the prosecutor repeatedly accused Santiago of fabricating it. No compelling interest warranted limiting Urrieta's right to defend against the State's accusations. Reversal is required because, by excluding this

evidence, the trial court denied Urrieta's constitutional right to present a complete defense.

a. Relevant Defense Evidence Must Be Admitted Unless the State Shows a Compelling Countervailing Interest Such as Disrupting the Fairness of the Trial.

To protect the right of accused persons to defend themselves, relevant defense evidence must be admitted unless the State can show a compelling interest to exclude it. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). If the court believes defense evidence is barred by evidentiary rules, "the court must evaluate whether the interests served by the rule justify the limitation." Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). The restriction on defense evidence must not be arbitrary or disproportionate to its purpose. Id.

Once it is shown that the evidence is even minimally relevant, the jury must be allowed to hear it unless the State can show it is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wn.2d at 622. Moreover, "It is not proper to 'allow[] one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.'" State v. Fankhouser, 133 Wn. App. 689, 695, 138 P.3d 140

(2006) (quoting State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

b. Letho's Identity Was Relevant to the Circumstances of the Allegation and to Rebut the State's Attack on Santiago's Credibility.

The court rejected the proffered defense evidence on the grounds that Letho's identity was "collateral," analogizing the defense's attempt to corroborate Santiago's testimony to impeaching witness credibility via extrinsic evidence of a collateral matter. 1RP 128. As discussed above, this court should review de novo the exclusion of relevant defense evidence. Jones, 168 Wn.2d at 719-20. However, even under an abuse of discretion standard, the court's ruling on this issue was manifestly unreasonable because the identity of the persons present at the time of the incident is directly material to the defense.

"The test as to whether an issue is material or collateral is: Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?" State v. Bassett, 4 Wn. App. 491, 493, 481 P.2d 939 (1971) (citing State v. Sandros, 186 Wash. 438, 58 P.2d 362 (1936); State v. Putzell, 40 Wn.2d 174, 242 P.2d 180 (1952)). The answer here is "yes," because the identity of the fourth passenger was relevant regardless of its tendency to rehabilitate Santiago's credibility.

Evidence is relevant when it has any tendency to make any fact at issue more or less likely. ER 401. Relevance depends on “the circumstances of each case and the relationship of the facts to the ultimate issue.” State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987) (citations omitted). “Facts tending to establish a party’s theory of the case will generally found to be relevant.” Id. (citing State v. Mak, 105 Wn.2d 692, 703, 718 P.2d 407 (1986)).

Under defense counsel’s offer of proof, Drasher would have testified, and the dispatch report would show, that Letho was in the car. 1RP 126. The presence of passengers makes it more likely that someone else placed the gun under the seat without Urrieta’s knowledge. The proffered evidence was relevant because it makes Urrieta’s knowledge less likely and, thereby, tends to establish the defense theory of the case.

Put another way, evidence that Letho was the fourth passenger related directly to the circumstances in which the allegations arose. See Jones, 168 Wn.2d at 717, 721 (defense’s account of events “contemporaneous with an alleged criminal act” was highly relevant and should not have been excluded under rape shield statute). Facts closely related to the alleged offense “cannot properly be deemed collateral.” State v. Hall, 10 Wn. App. 678, 680, 519 P.2d 1305 (1974). Letho’s identity was

not collateral. It was substantive evidence of the circumstances of the alleged offense.

The evidence was also admissible to corroborate Santiago's testimony because his credibility was under attack. Corroborating evidence is justified when there is an attack, "however slight" on the witness' credibility. State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 173 (1984) holding modified by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); see also United States v. Gaind, 31 F.3d 73, 78 (2d Cir. 1994) (government permitted to introduce truth-telling provisions of prosecution witnesses' agreements after Gaind's opening statement attacked the credibility of the witnesses). Even in discretionary surrebuttal, rather than, as here, the defense's case in chief, the defendant may "as a matter of right . . . rehabilitate his own witnesses whose credibility has been attacked by the prosecution's rebuttal evidence." State v. Harris, 12 Wn. App. 381, 386, 529 P.2d 1138 (1974).

Here, the prosecutor attacked Santiago's credibility and accused him of inventing Letho's name. 1RP 103, 108. Even if the evidence corroborating Letho's identity were not otherwise admissible, by accusing Santiago of making it up, the prosecutor opened the door to evidence rebutting that claim. The open door doctrine is designed to prevent the unfairness that would result if one party can bring up a topic to the point at

which a false impression is created, and then preclude the other party from refuting it. State v. Berg, 147 Wn. App. 923, 938-40, 198 P.3d 529 (2008). Even such bulwarks as a defendant's constitutional right to confront witnesses can fall before the open door doctrine. State v. Hartzell, 153 Wn. App. 137, 154, 221 P.3d 928 (2009) review granted, remanded on other grounds, 168 Wn.2d 1027, 230 P.3d 1054 (2010).

Berg illustrates application of the open door doctrine in similar circumstances. Berg was charged with third degree rape of a child and third degree child molestation. Berg, 147 Wn. App. at 926. During cross-examination, defense counsel asked the detective whether any family members had corroborated the child's account. Id. at 938. The detective answered that none had. Id. On redirect, the State elicited the detective's testimony that, in another case he had worked on, a mother saw what happened to her child but failed to report it to the police. Id. Berg argued his attorney was ineffective in failing to object to this irrelevant testimony about other cases. Id. at 939. The court rejected this argument, discussing the open door doctrine.

"Generally, once a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence." Id. The court held the detective's testimony about other cases was admissible because of Berg's cross-examination eliciting that none of the child's family

members had aligned with her. Id. The evidence was permitted to “explain why that might be the case and to contradict Berg’s suggestion that [the child’s] allegations were false.” Id. at 939-40.

The State in Berg was permitted to present testimony to correct the false impression that would otherwise have been created by Berg’s cross-examination and to contradict Berg’s suggestion that the child was lying. That is precisely the scenario here. The State’s cross-examination accused Santiago of fabricating his entire testimony, including specifically, Letho’s name. 1RP 103, 108. Urrieta should have been permitted to correct that false impression by establishing through independent evidence that Letho was the fourth passenger.

c. Neither the State Nor the Court Cited Any Compelling Interest That Would Require Exclusion.

Once counsel explained the relevance of this evidence, the court was bound to admit it unless it was so prejudicial it would “disrupt the fairness of the fact-finding process.” Darden, 145 Wn.2d at 622. The court was required to balance the state’s interest against Urrieta’s need for the information, and admit the evidence unless the state’s interest outweighed Urrieta’s need. Id. The court erred because Urrieta’s need for this testimony was great and neither the court nor the State identified any compelling interest for excluding it.

First, Urrieta's need for corroborating evidence was great, particularly after the State accused Santiago of lying. Thomas v. Chappell, 678 F.3d 1086, 1105 (9th Cir. 2012) cert. denied, 133 S. Ct. 1239 (2013), illustrates the importance of corroboration. In Thomas, defense counsel was held ineffective for failing to interview persons who could have corroborated the existence of a man a defense witness identified as another suspect. Id. The court declared, "Corroboration is always helpful. But it was critical here because by itself, [the defense witness]'s testimony was not particularly believable." Id. Corroboration was the key to creating reasonable doubt. Id. at 1106; see also Riley v. Payne, 352 F.3d 1313, 1320 (9th Cir. 2003) (quoting Brown v. Myers, 137 F.3d 1154, 1158 (9th Cir. 1998)) (without corroboration even a defendant's own testimony is not an "effective defense"). Here, the credibility of defense witnesses was under attack. Urrieta and Santiago had been accused of lying. Corroboration was key.

The State argued re-calling Drasher would be inefficient in light of the time constraints. 1RP 127. The court correctly rejected this argument, recognizing time constraints must give way to the overall fairness of the trial. 1RP 127. Moreover, the additional time required would have been minimal. Letho's identity was not a complex issue. It could be established with limited testimony or documentary evidence.

The court's concern for hearsay also did not amount to a compelling interest under the circumstances. First, even if the dispatch report were inadmissible, Urrieta suggested it only as an alternative to calling Drasher. The hearsay rules provide no basis for excluding Drasher's live testimony. As for the dispatch report itself, the hearsay rules do not amount to a compelling interest under the circumstances of this case. The dispatch report could have been redacted to edit out unnecessary hearsay information and admitted with a limiting instruction to correct the false impression created by the prosecutor.

Courts must safeguard the right to present a defense "with meticulous care." State v. Maupin, 128 Wn. 2d 918, 924, 913 P.2d 808 (1996) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)). The trial court failed to apply that meticulous care in this case, and Urrieta's conviction should be reversed.

Error in excluding relevant defense evidence is presumed prejudicial unless no rational juror could have a reasonable doubt as to guilt. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). That is not the case here. Even without Santiago's testimony, a reasonable juror could have found Urrieta did not know a gun was under his seat. The car did not belong to him, and there were back seat passengers who could have placed it there without his knowledge. 1RP 27, 42-43. Urrieta's conviction should be

reversed because he was deprived of the ability to present evidence corroborating an aspect of his defense.

2. PERVASIVE PROSECUTORIAL MISCONDUCT
VIOLATED URRIETA'S RIGHT TO A FAIR TRIAL.

A prosecutor is a quasi-judicial officer whose zealous advocacy must be tempered by the responsibility to ensure that every accused person receives a fair trial. State v. Jones, 144 Wn. App. 284, 295, 183 P.3d 307 (2008); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). A prosecutor who subverts or evades the constitutional safeguards protecting the rights of accused persons can render a criminal trial unfair. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). In reviewing prosecutorial misconduct, courts look not to isolated phrases or incidents, but the context of the entire trial. Id. at 704. A review of Urrieta's trial shows repeated and pervasive attempts to inject improper considerations into the trial.

a. The Prosecutor's Comments on the Late Disclosure of Santiago's Testimony Violated Urrieta's Right to Present a Defense and Urged the Jury to Find Urrieta Guilty on Improper Grounds.

One phrase summed up the State's closing argument regarding Santiago's testimony: "You don't get to do this." 1RP 147. The prosecutor used similar phrasing during cross-examination: "And you expect to come in here after all that's been said and done and just tell the jurors whatever you

want?” 1RP 105. In short, the prosecutor suggested Urrieta should not have been permitted to present Santiago’s testimony at all. But that is the judge’s decision, not the jury’s, and it was improper to suggest the jury should punish Urrieta for the late disclosure.

Accused persons have a due process right to present a complete defense including testimony and other evidence. Chambers, 410 U.S. at 294; Jones, 168 Wn.2d at 720; U.S. Const., amend VI; Const. art. I, § 22. “The State can take no action which will unnecessarily chill or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right.” State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006) (internal quotation marks omitted) (quoting State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984)). Additionally, “the State commits misconduct by asking the jury to convict based on their emotions, rather than the evidence.” State v. Fuller, 169 Wn. App. 797, 821, 282 P.3d 126 (2012) rev. denied, 176 Wn.2d 1006 (2013) (citing State v. Bautista–Caldera, 56 Wn. App. 186, 194–95, 783 P.2d 116 (1989)). Here, the State improperly sought to penalize Urrieta’s constitutional right to present witnesses in his defense and to arouse the jury’s anger about the last-minute disclosure of the defense witness and the hardship that created for the State.

For example, the State questioned Santiago declaring, “[Y]ou knew this the whole time and you wait until after I rested and my officers leave and then you come here?” 1RP 102. He continued, “My officers leave and now you have it.” 1RP 103. Moments later, he emphasized, “We have never talked about this, right?” and “I’m learning this right now.” 1RP 103. In closing argument, this theme continued with the argument that “It’s too late for the State to do anything. They can’t go out and conduct their investigation. They already rested their case.” 1RP 151.

When a witness comes forward at the last minute, a prosecutor may reasonably ask the jury to infer that, if the testimony were true, the witness would have come forward sooner. But the prosecutor here did not limit himself to arguing reasons to doubt Santiago’s veracity based on the late disclosure. Instead, he tried to arouse the jury’s anger because the late disclosure made his job more difficult. 1RP 102-03, 151.

Decisions regarding admissibility of evidence are for the judge, not the jury. ER 104. The usual remedy for late disclosure is a continuance. State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). Under extraordinary circumstances, the evidence may be excluded. Id. at 882. But since questions of admissibility are for the judge, it was improper to arouse the jury’s anger at the defendant for the late disclosure.

Cross-examination about matters relevant only to a trial court ruling, rather than to the jury's determination, is "clearly objectionable." Jones, 144 Wn. App. at 295. Closing argument on matters within the trial court's purview is similarly improper. State v. McCreven, 170 Wn. App. 444, 470-71, 284 P.3d 793 (2012) rev. denied, 176 Wn.2d 1015 (2013). For example, in McCreven, the prosecutor argued in closing that the State should not have to disprove self-defense because the defense had presented no evidence of it. Id. The court found this argument improper because the judge had already found sufficient evidence to instruct the jury on self-defense. Id. The court declared that, once the trial court finds sufficient evidence to warrant the jury instruction, "that inquiry, even if erroneous, has ended." Id. at 471.

Like the decision to give jury instructions, the decision to admit or exclude testimony is reserved for the trial court. ER 104. Jurors are routinely instructed, as they were in this case, not to concern themselves with the reasons behind a judge's evidentiary rulings. CP 30; 11 Washington Practice. Pattern Jury Instructions – Criminal, WPIC 1.02 (3d Ed). Permitting arguments such as those made in this case will chill the defendant's exercise of the right to present a defense and confuse the jury about its role. The prosecutor's comments improperly urged the jury to revisit the court's decision or penalize Urrieta for it. Cf. McCreven, 170 Wn.

App. at 470-71. These arguments constituted misconduct because both are improper bases for the jury's verdict.

b. The Prosecutor Offered Improper Personal Opinions on Witness Credibility and Guilt.

To ensure a fair trial and a verdict based on the law and the evidence, prosecutors must not offer personal opinions on the guilt of the defendant or the credibility of witnesses. State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010), rev. denied, 170 Wn.2d 1016 (2011) (citing United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980)). They must also refrain from reinforcing those opinions with facts outside the record or the prestige of their office. Id.; State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (citing United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir. 2007)).

Opinions by a prosecutor are improper when “the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.” Ish, 170 Wn.2d at 197 (quoting Roberts, 618 F.2d 530). That was indeed the message when the prosecutor argued Santiago’s testimony included many “mistakes.” 1RP 138. The opinion on Urrieta’s credibility was even more direct, “I went after him because I wanted the truth.” 1RP 150. This argument assumes the prosecutor knew the truth and was merely “assuring its revelation” by arguing with Urrieta. Ish, 170 Wn.2d at 197. By contrast, in opening statements, the prosecutor assured the jury the State would be

presenting “credible evidence” of guilt. 2RP 80. In addition to these specific assertions, the entire tenor of cross-examination and argument was designed to convey to the jury the prosecutor’s personal conviction that Urrieta and Santiago were lying. See, e.g., 1RP 102 (“Is that what you want us to believe?”); 1RP 105 (“And you expect to come in here after all that’s been said and done and just tell the jurors whatever you want?”); 1RP 108 (“And this guy, Aaron, right, let me guess, both of these guys were in the back seat.”).

In addition to presenting improper opinions on guilt and credibility, the prosecutor actively misled the jury by insinuating Santiago was making up the fact that Letho was in the back seat. 1RP 103, 108. Presumably, with his access to discovery, the prosecutor knew Letho was listed in the dispatch report as the fourth passenger. Ex. 11. Therefore, this line of questioning was misconduct because the prosecutor had no good faith basis to suggest Santiago was making up Letho’s name. “It is axiomatic that counsel cannot ask questions of a witness that have no basis in fact and are merely intended to insinuate the existence of facts to a jury.” State v. Avendano-Lopez, 79 Wn. App. 706, 713, 904 P.2d 324 (1995); see also State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984) (quoting State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955)) (prosecutor has “no right to mislead the jury”).

In closing argument, the State has great latitude to argue reasonable inferences from the evidence, but may not argue based on personal opinion or information outside the record. Glasmann, 175 Wn.2d at 704. The arguments that Santiago's testimony was full of mistakes, that it was necessary to "[go] after" Urrieta to get the truth, and that Santiago was lying about Letho's name were misconduct.

c. The Prosecutor's Argument to the Jury that "They Underestimate You" Was an Improper Emotional Appeal that Undermined the Presumption of Innocence.

As a quasi-judicial officer, "defendants are among the people the prosecutor represents." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Thus, in addition to refraining from emotional appeals that undermine the fairness of the trial, prosecutors may not create an alliance of the State and the jury against the accused. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). The jury must remain impartial and must uphold the presumption of innocence throughout the trial. State v. Evans, 163 Wn. App. 635, 643, 260 P.3d 934 (2011) ("The presumption of innocence continues throughout the entire trial and may only be overcome, if at all, during deliberations.") (citing State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813 (2010) (quoting 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (3d ed. 2008))). By suggesting that, during the

trial, the jury and the prosecutor are aligned against the defendant, a prosecutor undermines the presumption of innocence.

In Reed, the court condemned comments “calculated to align the jury with the prosecutor and against the petitioner.” 102 Wn.2d at 147. In that case, the prosecutor denigrated defense witnesses as “A bunch of city doctors who drive down here in their Mercedes Benz.” Id. at 143.

The prosecutor’s comments here were also calculated to align the jury with the prosecutor against Urrieta. By repeatedly arguing, “They underestimate you,” the prosecutor encouraged the jury to be angry with Urrieta and created an us-against-them dynamic that portrayed the prosecutor as the person on the jury’s side and Urrieta as the outsider. This was not merely one off-hand comment. The prosecutor accused the defense of underestimating the jury four times during closing argument. 1RP 147, 149, 151. Adding to the effect was the prosecutor’s argument to the jury that “They [the defense] can’t do this to you.” 1RP 151. The prosecutor also sought to blame the defense for wasting everyone’s time with a 20-minute delay: “I called him, and in the hallway he told his attorney, he will be here in 20 minutes. 20 minutes, and that’s what we were waiting for.” 1RP 147. These arguments were misconduct. A jury’s verdict should be based on its application of the law to the evidence, and a dispassionate assessment of

witness credibility and weight of evidence, not anger that the defense has offended the jury.

d. The Prosecutor's Pervasive Misconduct Caused Incurable Prejudice and Requires Reversal.

Prosecutorial misconduct violates the defendant's right to a fair trial and requires reversal of the conviction when the prosecutor's argument was improper and there is a substantial likelihood the misconduct affected the verdict. Glasmann, 175 Wn.2d at 703-04. Even when there was no objection at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. The focus of this inquiry is more on whether the effect of the argument could be cured than on the prosecutor's mindset or intent. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) rev. denied, 175 Wn.2d 1025 (2012) (citing State v. Emery, 174 Wn.2d 741, 759–61, 278 P.3d 653 (2012)).

The presence of misconduct and its prejudicial effect are determined in the context of the record and the circumstances of the trial as a whole. Glasmann, 286 P.3d at 678. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)).

Although the jury is presumed to follow the court's instructions, misconduct can be so prejudicial that instruction cannot cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's personal assurance of defendant's guilt was flagrant misconduct requiring reversal). "The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is, Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks." State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963) (quoting State v. Buttry, 199 Wn. 228, 251, 90 P.2d 1026 (1939) (internal quotation marks omitted)).

Here, the State repeatedly called jurors' attention to matters "which they would not be justified in considering in determining their verdict," Rose, 62 Wn.2d at 312, such as the difficulties posed to the State by the late disclosure of a defense witness, the prosecutor's personal opinion on the veracity of the Urrieta and Santiago, and alleged insults to jurors themselves. The arguments that essentially accused the defense of insulting the jury by underestimating them were particularly calculated to inflame the jury's emotions. Such arguments cannot generally be cured by instruction. Emery, 174 Wn.2d at 762-63; Pierce, 169 Wn. App. at 552.

Even if one isolated comment could perhaps be dismissed, the cumulative impact of the pervasive misconduct in this case requires reversal. Repeated instances of misconduct and their cumulative effect must be considered as a whole. See State v. Walker, 164 Wn. App. 724, 738, 265 P.3d 191 (2011) (improper comments used to develop theme in closing argument impervious to curative instruction). The cumulative effect of misconduct can overwhelm the power of instruction to cure. Glasmann, 286 P.3d at 679; Walker, 164 Wn. App. at 737.

The prosecutor created an atmosphere of animosity and focus on improper considerations that could not be remedied. The jury was likely to be influenced, regardless of any instruction because this case hinged on credibility, which often comes down to a gut feeling of who is believable. “[I]f you throw a skunk into the jury box, you can’t instruct the jury not to smell it.” Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962). “A prosecutor’s duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial.” Jones, 144 Wn. App. at 295 (citing Huson, 73 Wn.2d at 663). The prosecutor failed in this duty and Urrieta’s conviction should be reversed.

3. URRIETA'S CONSTITUTIONAL RIGHT TO REFUSE
CONSENT TO A WARRANTLESS SEARCH WAS
VIOLATED WHEN THE STATE COMMENTED ON HIS
REFUSAL OF A BREATH ALCOHOL TEST.

During cross-examination, the prosecutor questioned Urrieta about his refusal to take the alcohol breath test despite the consequences. 1RP 115. The only possible reason for eliciting this information was to suggest that only guilty persons opt not to cooperate with a police request to search. Counsel's objection based on a violation of the right to silence was overruled. 1RP 115. This impermissible comment on Urrieta's constitutional right to refuse consent to a search is manifest constitutional error that requires reversal of his conviction. See Gauthier, 174 Wn. App. at 267 (prosecutor's use of invocation of constitutional right to refuse consent to warrantless search as evidence of guilt was manifest constitutional error).

a. The Implied Consent Law Does Not Render the
Warrantless Search of a Person's Breath for Alcohol
Content Reasonable.

Breath alcohol testing is a search. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1413, 103 L. Ed. 2d 639 (1989) (breathalyzer test is a search because chemical breath analysis implicates concerns for bodily integrity). Warrantless searches are per se unreasonable. E.g., Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Both article I, section 7 of Washington's constitution and the Fourth Amendment limit government searches and

arbitrary intrusions into private affairs. State v. Houser, 95 Wn.2d 143, 148, 622 P.2d 1218 (1980) (citing State v. Smith, 88 Wn.2d 127, 559 P.2d 970 (1977); Seattle v. See, 67 Wn.2d 475, 408 P.2d 262 (1965)). “The reasonableness of a search or seizure must be decided in light of the facts and circumstances of the case.” Id. (citing South Dakota v. Opperman, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976)).

Because reasonableness depends on the facts and circumstances of the case, a statute purporting to authorize warrantless searches in every case where police suspect a person of driving under the influence does not automatically render such a search reasonable. State v. Reynoso, 41 Wn. App. 113, 119, 702 P.2d 1222 (1985) (citing Cooper v. California, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967)). “[T]he question . . . is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment.” Id. at 120 (quoting Cooper, 386 U.S. at 61).

b. Urrieta Had a Constitutional Right to Refuse Consent to the Warrantless Breath Test.

Both the Fourth Amendment and Article I, Section 7 safeguard the right to refuse to consent to a warrantless search. Schneekloth, 412 U.S. at 227; Gauthier, 174 Wn. App. at 267. Consent of the person to be searched is an exception to the general requirement that searches are unconstitutional

absent probable cause and a search warrant. Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797, 111 L. Ed. 2d 148, 156 (1990); State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927, 931 (1998). But that consent must be freely given; it must be voluntary. Id.

Urrieta exercised his right not to consent. No other exception to the warrant requirement applies in this case. There are no “per se” exigent circumstances based solely on the fact that blood alcohol levels decrease with time:

[W]hile the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Missouri v. McNeely, ____ U.S. ____, 133 S. Ct. 1552, 1563, ____ L. Ed. 2d ____ (2013). Exigent circumstances may exist based on concerns for officer safety, the possibility of escape, or the destruction of evidence. State v. Tibbles, 169 Wn.2d 364, 370, 236 P.3d 885 (2010). No facts in this case indicate that the delay to obtain a warrant would have been unusually long or would have implicated any of these concerns.

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), created a narrow exception to the probable cause and warrant requirements by permitting a brief investigative detention and pat-down for weapons. Ybarra v. Illinois, 444 U.S. 85, 93, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).

But the Terry exception does not apply to any search other than for weapons that could endanger the officer. Minnesota v. Dickerson, 508 U.S. 366, 373, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993); Ybarra, 444 U.S. at 93-94 (“Nothing in Terry can be understood to allow a generalized ‘cursory search for weapons’ or, indeed, any search whatever for anything but weapons.”). Because breath alcohol testing is unrelated to officer safety, Terry does not authorize such tests without a warrant.⁶

Moreover, even an exception to the warrant requirement does not negate the right to withhold consent. The State may have authority to search, but it may not coerce an individual’s consent. See, e.g., Schneckloth, 412 U.S. at 222. Consent must be voluntary. Id. at 227. The right to withhold consent should not hinge on a subsequent determination by an appellate court of the lawfulness of the search under some other exception to the warrant requirement. See United States v. Prescott, 581 F.2d 1343, 1350-51 (9th Cir. 1978) (When officer demands entry but presents no warrant, a person may presume the officer has no right to enter and refuse admission; refusal may not be used as evidence of guilt.); Elson v. State, 659 P.2d 1195, 1199 (Alaska 1983) (individuals should not be penalized “for their ignorance of the arcane intricacies of search and seizure law by allowing mistaken assertions of perceived fourth amendment rights to be used as evidence of

⁶ But see State v. Mecham, 181 Wn. App. 932, 331 P.3d 80, review granted, ___ Wn.2d ___, 337 P.3d 325 (2014) (holding field sobriety testing permissible under Terry).

guilt.”).⁷ Urrieta had a right not to consent. Gauthier, 174 Wn. App. at 267.

His exercise of that right was inadmissible. Id.

c. Admission of Urrieta’s Refusal Improperly Penalized Exercise of His Constitutional Privacy Rights.

In Gauthier, this Court held that exercising the right to refuse consent to a search is inadmissible as substantive evidence and the use of refusal to show guilt violates the constitution by improperly penalizing lawful exercise of a constitutional right. Id. In that case, Gauthier refused a police officer’s request for a DNA sample. Id. at 262. At trial, the prosecutor argued he would not have refused unless he were guilty. Id. This Court reversed his conviction, finding manifest constitutional error. Id. at 267, 270.

Although in this case, the prosecutor did not expressly argue Urrieta must be guilty because he refused, the only possible reason to elicit this fact was to penalize Urrieta’s refusal, to suggest that an innocent or honest person would have cooperated. Whether Urrieta consented to have his alcohol level tested when he was stopped for driving under the influence had no bearing on whether he knew there was a firearm under his seat. The exception permitting refusal evidence for impeachment purposes cannot apply because Urrieta made no contrary statements during his direct examination. See Gauthier, 174 Wn. App. at 267-68 (rejecting impeachment purpose where

⁷ But see Mecham, 181 Wn. App. at 946 (distinguishing Gauthier and holding no right to refuse field sobriety testing because tests were permissible under Terry).

Gauthier made no contrary claims on direct examination). Admission of the refusal evidence deprived Urrieta of his “right to invoke with impunity the protection of the Fourth Amendment and article I, section 7.” Id. at 267.

d. The Violation of Urrieta’s Constitutional Rights Requires Reversal.

This constitutional error requires reversal unless the State proves beyond a reasonable doubt that any reasonable juror would have come to the same conclusion without the error. Id. at 270 (citing State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008)). It cannot do so. The evidence was far from overwhelming; knowledge necessarily rests on credibility determinations and inferences from indirect evidence. The jury’s decision was likely to be influenced by the suggestion that only guilty persons fail to cooperate with police.

The court’s decision to admit this testimony is manifest constitutional error that may be raised for the first time on appeal. Gauthier, 174 Wn. App. at 267. Additionally, eliciting this inadmissible and unfairly prejudicial evidence amounts to yet another instance of prosecutorial misconduct. Avendano-Lopez, 79 Wn. App. at 713 (“Prosecutors are prohibited from inquiring into inadmissible matters.”).

Alternatively, if this Court should conclude the error was not preserved, defense counsel was ineffective in failing to object. “A claim of

ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). The right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution is violated when the attorney’s deficient performance prejudices the defendant. Strickland v. Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 229, 743 P.2d 816 (1987).

Counsel’s performance in failing to object was unreasonably deficient in light of Gauthier, decided nearly a year before trial in this case and the Supreme Court’s admonition in Jones more than a year before that. See 168 Wn.2d at 725; 174 Wn. App. at 267. Counsel was ineffective in failing to preserve this error for appellate review. See State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980) (Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal); State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise issue at sentencing).

Prejudice from deficient performance occurs when there is a reasonable probability that, but for counsel’s performance, the result would have been different such that confidence in the outcome is

undermined. Thomas, 109 Wn.2d at 226. That confidence is undermined here. A jury may feel a breath test refusal suggests untrustworthiness based on the refusal to cooperate with law enforcement. Because the case hinged on credibility, there is a reasonable probability this evidence and inference was a deciding factor. Urrieta's conviction should be reversed because he was denied his constitutional right to effective assistance of counsel.

4. CUMULATIVE ERROR DEPRIVED URRIETA OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. Davenport, 100 Wn.2d at 762; U.S. Const. Amend. XIV; Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007).

The accumulation of errors discussed above affected the outcome and produced an unfair trial in Urrieta's case. These errors include (1) improper exclusion of relevant defense evidence; (2) pervasive prosecutorial misconduct, and (3) admission of evidence Urrieta refused the breath test.

5. THE TRIAL COURT VIOLATED URRIETA’S RIGHT TO A PUBLIC TRIAL BY CONDUCTING PEREMPTORY CHALLENGES ON PAPER.

The public trial right is an “essential cog in the constitutional design of fair trial safeguards.” Bone-Club, 128 Wn.2d at 259; U.S. Const. amend. VI;⁸ Const. art. I, § 10; Const. Art. I, § 22. Court proceedings may not be closed to public view without consideration, on the record, of the factors discussed in Bone-Club. 128 Wn.2d at 258-59. When the court fails to abide by this procedure, trial closure is structural error requiring reversal. State v. Wise, 176 Wn.2d 1, 13-15, 288 P.3d 1113, 1118 (2012).

Jury selection is a critical part of the trial that must be open to the public. Id. at 11 (citing Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010)). Peremptory challenges are an integral part of selecting a jury. See State v. Saintcalle, 178 Wn.2d 34, 52, 309 P.3d 326 (2013) (peremptory challenges established by Washington’s first territorial legislature over 150 years ago); but see Marks, ___ Wn. App. at ___, (no. 44919-6-II, filed Dec. 2, 2014) (peremptory challenges are not part of jury selection). This should be the end of the inquiry. Courts may not exempt a proceeding from public view by closing the courtroom. Nor may they achieve the same effect by conducting the proceedings silently on

⁸ Washington’s Constitution provides at least as much protection of a defendant’s fair trial rights as the Sixth Amendment. Bone-Club, 128 Wn.2d at 260.

paper. Urrieta's conviction must be reversed because the private exercise of peremptory challenges violated his constitutional right to a public trial.

To determine whether a specific portion of jury selection implicates the public trial right, this Court has applied the "experience and logic" test. State v. Wilson, 174 Wn. App. 328, 337, 298 P.3d 148 (2013) (citing State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715, 722 (2012)). Under that test, the court analyzes two questions: (1) "whether the place and process have historically been open to the press and general public," and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The public trial right applies to the exercise of peremptory challenges because the answer to both questions is "yes."

a. Peremptory Challenges Have Historically Been Open to the Public.

"[S]ince the development of trial by jury, the process of selection of jurors has presumptively been a public process." Press-Enterprise, 464 U.S. at 505. In two recent cases, this Court has deemed the exercise of peremptory challenges to be an integral part of jury selection that has historically been open to the public. In Wilson, this Court held the public

trial right was not implicated when the bailiff excused two jurors due to illness before voir dire began. 174 Wn. App. at 347. The Court drew a distinction between administrative removal of potential jurors before voir dire and more integral portions of jury selection, including peremptory challenges. Id. at 342-43.

The Court explained, “[B]oth the Legislature and our Supreme Court have acknowledged that a trial court has discretion to excuse jurors outside the public courtroom for statutorily-defined reasons, provided such juror excusals do not amount to for-cause excusals or peremptory challenges traditionally exercised during voir dire in the courtroom.” Id. at 344 (emphasis added). Similarly, a trial court may delegate hardship and administrative excusals to other staff, “provided that the excusals are not the equivalent of peremptory or for cause juror challenges.” Id. Wilson’s public trial argument failed because he could not show “the public trial right attaches to any component of jury selection that does not involve ‘voir dire’ or a similar jury selection proceeding involving the exercise of ‘peremptory’ challenges and ‘for cause’ juror excusals.” Id. at 342.

In State v. Jones, 175 Wn. App. 87, 91, 303 P.3d 1084 (2013), this Court held the public trial right was violated when, during a court recess off the record, the clerk drew names to determine which jurors would

serve as alternates. The court recognized, “both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court.” Id. at 101. As in Wilson, the Jones court referred to the exercise of peremptory challenges as a part of jury selection that must be public. Id. The court held the selection of alternate jurors must be public because it is akin to exercising peremptory challenges. Id. at 98 (“Washington’s first enactment regarding alternate jurors not only specified a particular procedure for the alternate juror selection, but it specifically instructed that alternate jurors be called in the same manner as deliberating jurors and subject to for-cause and peremptory challenges in open court.”).

As Wilson and Jones suggest, the “experience” component of the Sublett test is satisfied in this case. The criminal rules of procedure show our courts have historically treated peremptory challenges as part of voir dire on par with for-cause challenges. Wilson, 174 Wn. App. at 342. CrR 6.4 (b) contemplates voir dire as involving peremptory and for-cause challenges. Id. CrR 6.4(b) describes “voir dire” as a process where the trial court and counsel question prospective jurors to assess their ability to serve on the particular case and to enable counsel to exercise intelligent “for cause” and “peremptory” juror challenges. Id. at 343.

This stands in sharp contrast with CrR 6.3, which contemplates administrative excusal of potential jurors before voir dire begins in the public courtroom. Id. at 342-43. In further contrast, a trial court has discretion to excuse jurors outside the public courtroom under RCW 2.36.100 (1), but only so long as “such juror excusals do not amount to for-cause excusals or peremptory challenges traditionally exercised during voir dire in the courtroom.” Id. at 344 (emphasis added).

b. Public Access Plays a Significant Positive Role in Ensuring Fairness in the Exercise of Peremptory Challenges.

The “logic” component of the Sublett test is satisfied as well. While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties’ exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 48-50, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). A prosecutor may not challenge a juror based on race, ethnicity, or gender. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Racial discrimination in jury selection casts doubt on the integrity of the judicial process and the fairness of criminal proceedings. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); Saintcalle, 178 Wn.2d at 41 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991)). Discrimination remains

rampant and can unconsciously seep into decision-making. Saintcalle, 178 Wn.2d at 35-36, 46-49.

The court in Filitaula recognized that a record of information about how peremptory challenges were exercised could be important in assessing whether there was a pattern of race-based peremptory challenges. ____ Wn. App. at ____, slip op. at 4. But the court failed to appreciate that a record being made available after the fact is insufficient to provide the requisite scrutiny.

The Peremptory Challenges document lists names; it does not reveal race. CP 78. Without the ability to hear and see the selection of jurors as it occurs, the public has no ability to assess whether challenges are being handled fairly and within the confines of the law or, for example, in a manner that discriminates against a protected class. See Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (jury selection primary means to “enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice.”).

An open peremptory process safeguards against discrimination by discouraging both discriminatory challenges and the subsequent discriminatory removal of jurors that have been improperly challenged. The process directly impacts the fairness of a trial, and it is inappropriate to shield it from public scrutiny. Public trials are a check on the judicial

system that provides for accountability and transparency. Wise, 176 Wn.2d at 6. “‘Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings.’” Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)).⁹ Both experience and logic indicate that the exercise of peremptory challenges is a crucial part of a criminal trial that must be open to the public.

c. The Procedure Used in this Case Was Private.

The public trial right helps assure that trials are fair, deters misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 5. These purposes are only served if the proceedings are actually observable by the public. Thus, it is unsurprising that courts have found this right was violated when proceedings were held in a location that is not accessible to the public, regardless of whether the courtroom itself was physically closed. See, e.g., State v. Strobe, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (proceedings in chambers were closed). This Court should reject any assertion that the procedure in this case was public. See People v. Harris, 10 Cal. App. 4th 672, 684, 12 Cal.

⁹ But see Love, 176 Wn. App. at 919 (exercise of peremptory challenges “presents no questions of public oversight.”).

Rptr. 2d 758 (Cal. Ct. App. 1992) (exercise of peremptory challenges in chambers violates defendant's right to a public trial).

The purpose of the process was apparently to ensure that jurors did not know which side had excused which juror. The public was not privy to what was occurring as the parties wrote down their peremptory challenges on the paper. 2RP 69-70. This procedure was closed to the public just as if it had taken place in chambers. The practical impact is the same — the public was denied the opportunity to scrutinize events. The sequence of events through which the eventual constituency of the jury “unfolded” was kept private. Harris, 10 Cal. App. 4th at 683 n.6.

d. The Conviction Must Be Reversed Because the Court Did Not Justify the Closure Under the Bone-Club Factors.

Conducting peremptory challenges in private and excluding the public from observing that process violated Urrieta's right to a public trial. *Before* a trial judge closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the

closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.¹⁰

There is no indication the court considered the Bone-Club factors before conducting the private challenges in this case. Appellate courts do not comb through the record to deduce whether the trial court applied the Bone-Club factors when it is not apparent. Wise, 176 Wn.2d at 12-13.

Because peremptory challenges were not exercised openly, Urrieta's constitutional right to a public trial under the state and federal constitutions was violated. The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14. "Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." Id. at 16. Urrieta's conviction must be reversed. Id. at 19.

¹⁰ The Bone-Club requirements are similar to those set forth by the United States Supreme Court. In re Pers. Restraint of Orange, 152 Wn.2d 795, 805-06, 100 P.3d 291 (2004) (discussing Waller, 467 U.S. at 45-47).

This issue may be raised for the first time on appeal and is not waived by failure to object. Id. at 9, 15. Indeed, a defendant must have knowledge of the public trial right before it can be waived. In re Pers. Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). Here, there was no discussion of Urrieta's public trial right before the peremptory challenges were exercised on paper. 2RP 69-70. There is no waiver, and Urrieta's conviction must be reversed.

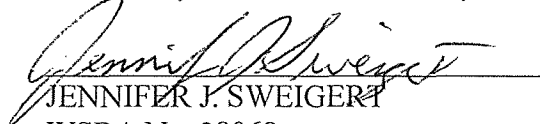
D. CONCLUSION

For the foregoing reasons, Urrieta requests this Court reverse his conviction.

DATED this 18th day of December, 2014.

Respectfully submitted,

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 46348-2-II
)	
MANUEL URRIETA,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MANUEL URRIETA
 DOC NO. 348302
 CLALLAM BAY CORRECTIONS CENTER
 1830 EAGLE CREST WAY
 CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF DECEMBER 2014.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

December 18, 2014 - 1:38 PM

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